STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2012
v	No. 302140 Wayne Circuit Court
RASHAD DARNELL BEARDEN, Defendant-Appellant.	LC No. 10-009637-FC

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carjacking, MCL 750.529a; two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; felonious assault, MCL 750.82; and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced to concurrent prison terms of 156 months to 25 years for the carjacking conviction, 5 to 10 years for each assault with intent to do great bodily harm conviction, and two to four years for the felonious assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but vacate his sentences and remand for resentencing.

Defendant's convictions arise from his participation in an August 2, 2010, carjacking, during which Sean O'Neil was shot twice. Co-defendant Antonio Parker was also charged in the offense. Earlier, O'Neil had contacted Parker, whom he did not know, about purchasing marijuana. O'Neil, accompanied by his friend Joseph Oskarek, drove his 1999 four-door Ford Crown Victoria to pick up Parker and Parker's friend, Evans. Pursuant to Parker's instructions, O'Neil drove to an apartment complex in Taylor. Parker was given $10 and left the car while O'Neil, Oskarek and Evans waited with the car running. Parker later returned with a man whom O'Neil identified as defendant. Parker sat in the driver's side back seat while defendant stood next to the car, directly outside O'Neil's window. Shortly after the drug transaction was completed, Evans exited the car and Parker produced a gun, pointed it at O'Neil's head, and demanded the keys to the car. O'Neil grabbed the barrel of the gun and turned it toward the floor. He then drove in reverse. As soon as O'Neil accelerated, defendant pulled out a gun from his waistband and started shooting. O'Neil testified that defendant shot him twice, once in the chest and once in the wrist, while Parker never fired his gun. Oskarek testified that Parker might have fired at least one shot during the struggle with O'Neil, but he did not know who fired the shots that struck O'Neil. Defendant eventually ran. Parker also ran after dropping his gun in

O'Neil's car. At trial, defendant presented an alibi defense through his mother, and the defense argued that O'Neil's identification was not credible and that O'Neil's and Oskarek's testimony was not reliable because it was inconsistent.

I. SCORING OF OV 6

Defendant first argues that he is entitled to resentencing because the trial court erroneously scored offense variable (OV) 6 of the sentencing guidelines. The prosecutor concedes error on this point, and we agree.

OV 6 is scored for the offender's intent to kill or injure another person. MCL 777.36. The trial court scored 25 points for OV 6, determining that defendant acted with an unpremeditated intent to kill, intended to do great bodily harm, or created a very high risk of death or great bodily harm. MCL 777.36(1)(b). However, the sentencing guidelines explicitly limit the scoring of OV 6 to the sentencing offenses of "homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder." MCL 777.22(1). The sentencing offense in this case was carjacking. Therefore, it was plain error to score 25 points for OV 6.

If OV 6 is correctly scored at zero points, defendant's total OV score decreases from 67 to 42 points. This scoring adjustment moves defendant from OV Level IV (60 to 79 points) to OV Level III (40 to 59 points), and lowers defendant's guidelines range from 126 to 210 months to 108 to 180 months. MCL 777.62. Because the scoring error affects the appropriate guidelines range, it affected defendant's substantial rights. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006). We therefore vacate defendant's sentences and remand for resentencing.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel at trial. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

A. FAILURE TO CHALLENGE O'NEIL'S IDENTIFICATION

Defendant argues that trial counsel was ineffective for failing to move to exclude O'Neil's identification testimony, which defendant contends was based on an impermissibly suggestive photographic lineup. "An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). However, a mere physical difference between the lineup participants does not render the photographic lineup procedure necessarily defective. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). "[D]ifferences in

the composition of photographs, in the physical characteristics of the individuals photographed, or in the clothing worn by a defendant and the others pictured in a photographic lineup have been found not to render a lineup impermissibly suggestive." *People v Kurylczyk*, 443 Mich 289, 304-305; 505 NW2d 528 (1993). Such differences relate only to the weight of the identification and are "significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants." *Hornsby*, 251 Mich App at 466. The fairness or suggestiveness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *Kurylczyk*, 443 Mich at 302; *Hornsby*, 251 Mich App at 466.

The record does not support defendant's argument that the photographic lineup was unduly suggestive or improper. The lineup contains six color photographs of young similarly-sized, African-American males. There is nothing about the other five participants that renders defendant substantially distinguishable. Defendant and four of the other participants have similar short haircuts, while the sixth participant is nearly bald. On the day of the shooting, O'Neil described the perpetrator as having a mustache, and all six lineup participants have mustaches that are similar in size and style. The defense noted at trial that defendant was the only participant wearing a white shirt, but that fact is not significant. O'Neil described the perpetrator as wearing a black shirt and two of the participants were wearing black shirts. Like defendant, the remaining three participants were uniquely dressed. Participant number two is wearing a blue polo shirt, participant number five is wearing a green shirt, and participant number six is wearing a brown striped shirt. The defense pointed out during trial that defendant had the darkest complexion. Although participant numbers two, five, and six have lighter complexions than defendant, participant numbers one and three have complexions that are similar to defendant's skin tone. The variations in the complexions of the participants do no render the lineup impermissibly suggestive. Any physical differences in the participants related only to the weight of O'Neil's identification, not its admissibility. Trial counsel raised those differences during his cross-examination of O'Neil.

Moreover, the record supports the existence of an independent basis for O'Neil's in-court identification. See *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000). O'Neil had the opportunity to observe defendant as he walked up to the car, as he stood outside O'Neil's window during the drug transaction, when he gave defendant a cigarette, as defendant pulled a gun from his waistband, and as defendant was shooting at him from two feet away. O'Neil testified that he had parked his car by a light and his window was down. O'Neil had a brief exchange with defendant when defendant asked him for a cigarette and O'Neil got a good look at defendant. Further, O'Neil identified defendant from the photographic lineup 17 days after the offense and wrote "100% sure" under defendant's photograph. O'Neil testified at trial that he was certain of his identification of defendant and never identified anyone other than defendant as the person that shot him. Given this record, defendant has not demonstrated a reasonable probability that any motion to suppress would have been successful. Counsel was not required to make a futile motion. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

B. BULLET ANALYSIS

Defendant also argues that trial counsel was ineffective for failing to request testing on a bullet recovered from the interior of the front seat passenger side door of O'Neil's car to determine if it was fired from Parker's gun. Counsel's decisions about what evidence to present and how to argue the evidence are matters of trial strategy, which this Court will not evaluate with the benefit of hindsight. *Rockey*, 237 Mich App at 76-77. Given the evidence in this case, trial counsel could have reasonably determined that an analysis on the bullet would not have been significant to the outcome of defendant's case. O'Neil testified that he was certain that defendant shot him from outside and described a scenario of how he and Parker struggled over Parker's gun. Although Oskarek thought that Parker might have fired at least one shot, he did not know who fired the shots that struck O'Neil. The evidence indicated that O'Neil's car was damaged on the exterior driver's side rearview mirror, the exterior driver's side panel of the windshield, and the interior front seat passenger side door, which supported O'Neil's claim that the gunshots originated from outside the car on the driver's side. Again, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Moreover, defendant has not established that he was prejudiced by trial counsel's decision in this regard. Even a finding that the bullet was from Parker's gun would not have exculpated defendant because it would not have overcome the physical damage to the exterior of O'Neil's car or O'Neil's identification of defendant as the person who shot him. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

C. ANDREW MONTANEZ

Defendant's next ineffective assistance of counsel claim relates to trial counsel's failure to call Andrew Montanez as a witness. The prosecution listed Montanez on its witness list, but did not call him at trial.

The record indicates that trial counsel was aware of Montanez, but does not disclose why counsel did not call him as a witness. The decision whether to call a witness is a matter of trial strategy. *Rockey*, 237 Mich App at 76. According to defendant, Montanez identified him as a person involved in this incident while being interrogated by the police and that identification led to defendant's arrest. Defendant has not overcome the strong presumption that counsel chose not to call Montanez—a clearly adverse witness—as a matter of strategy. Further, defendant has not provided a witness affidavit, or identified any other evidence of record establishing that Montanez actually would have testified at trial and provided favorable testimony. Absent such a showing, defendant has not established that he was prejudiced by trial counsel's failure to call Montanez at trial.

D. PROSECUTOR'S CLOSING ARGUMENT

Defendant next argues that trial counsel was ineffective for failing to object during the prosecutor's closing argument. As discussed in section III, *infra*, the prosecutor's remarks were not clearly improper. Therefore, defense counsel's failure to object was not objectively

unreasonable. Further, the trial court's jury instructions were sufficient to dispel any possible prejudice. Therefore, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different.

E. SCORING OF OV 6

We need not address defendant's claim that trial counsel was ineffective for failing to object to the scoring of OV 6. As discussed in section I, *supra*, OV 6 was incorrectly scored and, as a result, defendant is entitled to resentencing. Therefore, defendant will receive the remedy he requests in relation to this ineffective assistance of counsel claim.

III. THE PROSECUTOR'S CONDUCT

Defendant argues that he is entitled to a new trial because the prosecutor improperly vouched for his witnesses and evidence during closing argument. We disagree.

Because defendant did not object below to the prosecutor's conduct, this issue is unpreserved. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). We will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A prosecutor may not express a personal opinion about a defendant's guilt, *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995), or vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, prosecutors are afforded great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). They may argue the evidence and all reasonable inferences that arise from the evidence as it relates to their theory of the case, including that a witness is worthy of belief, and they need not state their inferences in the blandest possible language. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996), overruled in part on other grounds in *People v Houthoofd*, 487 Mich 568, 583; 790 NW2d 315 (2010); *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Contrary to what defendant argues, the prosecutor did not mitigate and excuse the 16-year-old complainants' actions by referring to their decisions as "young and dumb." The prosecutor explained what he meant by the colloquial phrase and, when commenting about their poor decision-making, delineated the evidence of the specific actions that led them to the location in Taylor. Viewed in context, the prosecutor simply provided a narration of the events based on the evidence, and did not suggest that he had special knowledge that the prosecution witnesses were credible.

The prosecutor's remarks that Oskarek was truthful were part of a permissible argument regarding credibility that was focused on countering defendant's claim during opening statement and trial that O'Neil's identification of defendant was not credible based on Oskarek's failure to also identify defendant, and providing reasons why both O'Neil and Oskarek should be believed. In opening statement, trial counsel stated the "evidence will show that the two stories are going to be completely inconsistent with each other. Two people sitting in the same car, at the same

time, seeing the same event are going to tell you two completely different stories." When making the challenged remarks, the prosecutor urged the jury to evaluate the testimony, discussed the reliability of Oskarek's testimony, and argued that there were reasons from the evidence to conclude that defendant was guilty of the charged crimes. The prosecutor noted that Oskarek could have lied about seeing defendant's face, but he did not. He further argued that it was entirely possible for only O'Neil to have seen defendant's face based on their respective positions in the car, that O'Neil gave defendant a cigarette, and the fact that Oskarek froze during the incident. Viewed in context, the prosecutor's remarks were not clearly improper.

Lastly, the prosecutor's argument that "there's enough" evidence to convict defendant of assault with intent to commit murder was a reasonable inference from the testimony and the medical records. When making the challenged remarks, the prosecutor noted the evidence that defendant shot O'Neil, that O'Neil was hospitalized as a result of the gunshot wound, and that O'Neil's chest was "cracked open to drain" and "intubated to breathe." The prosecutor's argument was not improper.

Further, a timely objection to the challenged remarks and arguments could have cured any perceived prejudice by obtaining an appropriate cautionary instruction. See *Watson*, 245 Mich App at 586. And even though defendant did not object, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that it was to decide the case based only on the properly admitted evidence, and that it was to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). It is well established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

IV. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises a sufficiency of the evidence claim in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. Specifically, defendant argues that the prosecution failed to present sufficient evidence to sustain his carjacking conviction as an aider and abettor. Again, we disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The carjacking statute, MCL 750.529a, provides:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle . . . is guilty of carjacking . . .
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> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur in an attempt to commit the larceny, or

> during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

At trial, the prosecutor advanced the theory that defendant was also guilty as an aider or abettor in the carjacking. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant [either] intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement[,]" *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (citation omitted), "or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense," *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). "Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *Carines*, 460 Mich at 757; *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992).

In this case, viewed in a light most favorable to the prosecution, the evidence was sufficient to show, first, that Parker committed the crime of carjacking by pointing a gun at O'Neil's head while sitting in the rear of O'Neil's car and demanding O'Neil to turn over his car keys and turn off his car. Contrary to what defendant argues, a defendant does not have to actually succeed in taking a victim's car to be guilty of carjacking. See MCL 750.529a(2) and *People v Williams*, 288 Mich App 67; 792 NW2d 384 (2010), lv gtd 489 Mich 856 (2011). Second, there was sufficient evidence that defendant assisted Parker in the commission of the crime by standing directly outside the driver's side window, while armed, as Parker demanded O'Neil's keys and acting as Parker's backup by shooting at O'Neil when O'Neil did not render the vehicle to Parker.

Third, the evidence was sufficient to show that defendant knew and intended for Parker to commit the carjacking. An aider or abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, and the defendant's participation in the planning or execution of the crime. *Carines*, 460 Mich at 758. The evidence that defendant accompanied Parker to O'Neil's car, acted in concert with Parker when he walked around and positioned himself directly next to O'Neil's car door as Parker got in the vehicle, watched and waited as Parker was carrying out the carjacking, and pulled his own firearm and started shooting when Parker's attempt to take the vehicle failed, considered together, was sufficient to support a finding that defendant knew and intended for Parker to commit carjacking. Accordingly, the evidence was sufficient to support defendant's carjacking conviction under an aiding and abetting theory.

We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen Fort Hood